

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, DC 20554

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In the Matter of:

Communications Assistance for  
 Law Enforcement Act

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CC Docket No. 97-213

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

**REPLY COMMENTS OF  
 PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo")<sup>1</sup> hereby replies to comments submitted in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding.<sup>2</sup> As discussed herein, the record in this proceeding demonstrates that the Commission should: (1) intervene in the standards dispute between industry and the Federal Bureau of Investigation ("FBI"); (2) adopt a blanket extension of the October 25, 1998 compliance deadline; (3) consider the lack of available standards in reviewing requests under Section 109's "reasonably achievable" standard; (4) reject the burdensome and unnecessary carrier recordkeeping and procedural requirements proposed in the *CALEA NPRM* and the FBI's comments; and (5) clarify that all information services provided by telecommunications carriers are not subject to CALEA requirements.

<sup>1</sup> PrimeCo is the broadband A/B Block PCS licensee or is the general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

<sup>2</sup> *Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking*, CC Docket No. 97-213, FCC 97-356 (released October 10, 1997), *Errata* (released October 24, 1997) ("*CALEA NPRM*").

**I. LAW ENFORCEMENT'S STATUTORY INTERPRETATION AND RECENT ACTIONS REGARDING CALEA'S TECHNICAL AND STANDARDS REQUIREMENTS UNDERSCORE THE NEED FOR COMMISSION INTERVENTION IN THE STANDARDS PROCESS**

As PrimeCo and other parties noted in comments, industry has adopted an interim technical standard — J-STD-0025 — which satisfies the requirements of Section 103. The FBI believes that this interim standard is insufficient, however, and the Department of Justice (“DOJ”) has recently concluded that nine of the eleven additional “gold-plating” capabilities requested by the FBI satisfy Section 103 requirements.<sup>3</sup> PrimeCo does not dispute the FBI’s authority to disagree with industry on this matter. Law enforcement’s heavy-handed approach to resolving this difference of opinion, however, directly contravenes CALEA and usurps the Commission’s statutorily-mandated role in the standards process.

CALEA provides that a service provider “*shall be*” deemed compliant with Section 103 capability requirements if it “is in compliance with publicly available technical requirements or standards *adopted by an industry association or standard-setting organization*, or by the Commission under [Section 107(b)], to meet the requirements of section 103.”<sup>4</sup> Section 107 provides further that “if a Government agency or any other person believes that . . . the technical requirements or standards [issued by industry associations or standard-setting

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<sup>3</sup> See Correspondence to Mr. Jay Kitchen, Pres., Personal Communications Ind. Ass’n, from Stephen R. Colgate, Asst. Attorney General for Administration, dated February 3, 1998 (“Colgate Letter”). At the other end of the spectrum, pro-privacy advocacy groups contend that the interim standard — which was modified considerably in an effort to respond to law enforcement’s concerns — *exceeds* the requirements of Section 103. See, e.g., Comments of the American Civil Liberties Union et al., at 7-10; Comments of the Center for Democracy and Technology et al. at 5.

<sup>4</sup> 47 U.S.C. § 1006(a)(2) (emphasis added); see also Correspondence from Senator Patrick Leahy to Attorney General Janet Reno and FBI Director Louis Freeh, dated February 4, 1998, at 2 (“Leahy Letter”) (“industry has adopted an ‘interim’ standard that is publicly available, in compliance with CALEA section 107”).

organizations] are deficient, *the agency or person may petition the Commission* to establish, by rule, technical requirements or standards” consistent with the enumerated statutory requirements of Sections 103 and 107(b).<sup>5</sup> Neither the FBI, nor any other government agency, have filed such a petition.<sup>6</sup> The FBI contends in its comments, however, that carriers’ use of an interim standard that fails to include the FBI’s requested features is insufficient to invoke the Section 107(a)(2) safe harbor.<sup>7</sup> The FBI’s warning is clear: unless industry adopts the capability requirements requested by the FBI, the FBI will deem carriers in noncompliance.

These comments, particularly in light of recent correspondence from DOJ to industry representatives regarding DOJ’s intentions for CALEA enforcement, underscore law enforcement’s apparent disregard for CALEA’s statutory requirements.<sup>8</sup> In this correspondence, DOJ purports to set forth “the conditions under which DOJ would agree not to pursue enforcement actions against the carrier under section 108 of CALEA with regard to the CALEA mandate that a carrier meet the assistance capability requirements pursuant to CALEA section 103 by October 25, 1998, . . . .”<sup>9</sup> In order to obtain a grant of FBI forbearance, DOJ maintains that a carrier must submit to the FBI a statement identifying a number of conditions, none of which bear any resemblance to the procedures and requirements set forth by Congress.

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<sup>5</sup> *Id.* §§ 1002, 1006(b) (emphasis added).

<sup>6</sup> *See* Leahy Letter at 2 (inquiring whether industry’s interim standard constitutes Section 107 safe harbor and “[i]f not, why have [DOJ and the FBI] delayed in proceeding under the statute to challenge the standard at the FCC?”).

<sup>7</sup> FBI Comments at 38 ¶ 90.

<sup>8</sup> *See, e.g.,* Colgate Letter; Correspondence to Mr. Matthew J. Flanigan, Pres., Telecommunications Ind. Ass’n, from Attorney General Janet Reno, dated January 23, 1998 (“Reno Letter”).

<sup>9</sup> Colgate Letter at 3.

Law enforcement's means of recourse under CALEA to voice dissatisfaction with the industry standard is plain — *it must petition the Commission pursuant to Section 107(b)*.

Allowing the FBI to carry out its announced intention to “enter into an agreement with the manufacturer of the carrier’s equipment” on issues such as technical requirements for a specific switch platform and deployment schedule, and to require manufacturers to appeal disputes with the FBI *to the Attorney General*, would usurp the Commission’s important role in the standards process and the safe harbor mandated by Congress.<sup>10</sup> The Commission must therefore reject the FBI’s “fox guarding the henhouse” approach to carrier compliance and should clarify, as PrimeCo requested in its comments, that the interim standard satisfies Section 103.

## **II. THE DELAYS IN THE STANDARDS PROCESS DEMONSTRATE THAT A BLANKET EXTENSION OF THE OCTOBER 25, 1998 COMPLIANCE DEADLINE IS WARRANTED**

The record demonstrates that carriers will be unable to bring their facilities into compliance with the October 25, 1998 deadline.<sup>11</sup> Intervening events since the December 12, 1997 date for filing comments further underscore the need for such an extension. First and most important, the FBI was required to publish its final capacity requirements more than two years ago, and once again failed to release those capacity requirements by its own *self-imposed* deadline of January 1998. As AirTouch noted in its comments, the design of assistance capability requirements is heavily influenced by capacity requirements, and as Senator Leahy

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<sup>10</sup> See Reno Letter at 1; Colgate Letter at 3-5. PrimeCo also agrees with Senator Leahy that compelling carriers to “stri[k]e deals with the Department of Justice and/or the FBI will unravel the important balance among privacy, innovation and law enforcement interests around which the law was crafted.” See Leahy Letter at 3.

<sup>11</sup> See, e.g., Ameritech Comments at 9-10; AT&T Comments at 23-27; U S WEST Comments at 38 n.66.

noted in recent correspondence to the FBI and DOJ, in the absence of the publication of capacity requirements “the earliest date by which the capacity requirements can now be effective is in 2001.”<sup>12</sup> Furthermore, all commenting parties agree that CALEA-compliant equipment will not be available by the October 25, 1998 deadline. Indeed, in its January 26, 1998 report to Congress, the FBI itself acknowledged that “carriers cannot begin their deployment process until a solution is available.”<sup>13</sup> The FBI further stated that switch vendors Lucent, Nortel, and Siemens may have only *partial* solutions available between late 1998 and first quarter 2001.<sup>14</sup> The Commission should therefore grant CTIA’s petition for a two-year extension of the deadline.

PrimeCo notes also that Commission involvement in the standards process is critical to protect its statutory role with respect to extension requests. In the *CALEA NPRM*, the Commission determined to “not propose to promulgate specific rules regarding [extension] requests at this time.”<sup>15</sup> The FBI inexplicably views agency review of extension requests as indicative of a statutory or regulatory void when, in fact, none exists and the statute is clear. Section 107(c) provides that a carrier “may petition *the Commission* for 1 or more extensions” of the October 25, 1998 deadline, and that an extension may be granted where compliance “is not reasonably achievable through *application of technology available within the compliance period*.”<sup>16</sup> The FBI, however, on an *ex parte* basis and without public notice and comment, has

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<sup>12</sup> Leahy Letter at 2.

<sup>13</sup> Department of Justice, Federal Bureau of Investigation, CALEA Implementation Report, January 26, 1998, at 8 (“Implementation Report”).

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *CALEA NPRM* ¶ 50.

<sup>16</sup> 47 U.S.C. § 1006(c)(1), (2) (emphasis added).

adopted its own set of criteria for “forbearance” which, if allowed to proceed, will effectively abrogate the Commission’s Section 107 extension authority.<sup>17</sup>

The Commission must not relinquish its CALEA responsibilities in this fashion. As CTIA and other industry parties have confirmed, industry compliance with the October 25, 1998 deadline is impossible because of the absence of standards. Accordingly, an extension is warranted under the statute and should be granted herein.

### **III. THE FBI’S INTERPRETATION OF THE “REASONABLY ACHIEVABLE” STANDARD UNDER SECTION 109 IS INCONSISTENT WITH CALEA**

The FBI proposes that carriers include, in their Section 109 petitions to the Commission, a dollar amount estimate of the costs directly associated with the modifications under consideration.<sup>18</sup> The FBI also asserts that “the effect of compliance on public safety and national security should be deemed to be the paramount consideration in the FCC’s determination of reasonable achievability.”<sup>19</sup> Consistent with the FBI’s overall approach to CALEA implementation, both proposals pose serious problems and again “stack the deck” against carriers in contravention of CALEA.

First, until capacity requirements, standards and implementing equipment are available, it is impossible for carriers to provide reliable dollar amount estimates for necessary CALEA modifications. In this regard, PrimeCo’s vendors to date have been unable to provide

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<sup>17</sup> Nowhere does DOJ assert the statutory basis for its “forbearance” policy. It is unclear how DOJ, through a self-styled “legal opinion,” can purport to impose substantive, binding rules on service providers and manufacturers in this manner.

<sup>18</sup> FBI Comments at 40-41 ¶¶ 94-96.

<sup>19</sup> *Id.* at 40-41 ¶ 96.

cost estimates to carriers.<sup>20</sup> Again, without such data, carriers cannot provide reasonable CALEA modification estimates.

Furthermore, with respect to the priority given to public safety and national security concerns, the FBI has simply misrepresented the statute. Section 109 requires that the Commission consider a number of *other* factors, including “the provision of new technologies and services” and “financial resources of the telecommunications carrier.”<sup>21</sup> The statute does not prioritize one factor over the other, but instead requires a balancing of all the relevant factors.<sup>22</sup> Once again, the FBI’s statutory interpretation is simply wrong.

#### IV. THE FBI’S PROPOSED RECORDKEEPING AND PROCEDURAL REQUIREMENTS ARE UNNECESSARILY BURDENSOME

The record demonstrates that the Commission’s proposed carrier recordkeeping and procedural requirements are unnecessary and unduly burdensome.<sup>23</sup> Contrary to other

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<sup>20</sup> PrimeCo understands (and the FBI’s Implementation Report reveals) that more specific levels of cost and technical information *have* been provided to the FBI, but the Company has not been privy to those discussions.

<sup>21</sup> 47 U.S.C. § 1008(b).

<sup>22</sup> Congress intended that *the Commission* have authority to grant or deny Section 109 “reasonably achievable” requests based on enumerated criteria, including: the effect on public safety and national security; the need to protect consumers’ privacy; the effect on rates for basic residential service; the effect on the nature and cost of the equipment, facility, or service at issue; new services deployment; and the effect on competition. *Id.* § 1008(b)(1). The FBI’s proposed forbearance plan does not address most of these factors. Indeed, PrimeCo submits that to the limited extent the FBI intends to include criteria similar to that enumerated in Section 109 — *e.g.*, “the fairness and reasonableness of the CALEA solution price” — it remains unqualified to do so, as Congress has reserved such issues to *Commission* review and consideration. *See* Colgate Letter at 4.

<sup>23</sup> *See, e.g.*, AirTouch Comments at 19-26; Bell Atlantic Mobile Comments at 3-4; BellSouth Comments at 12-13; PCIA Comments at 10-12; U S WEST Comments at 13-  
(continued...)

commenting parties, the FBI has proposed micromanagement of carrier operations beyond those proposed by the Commission and beyond what is required (and authorized) by statute. In this regard, the FBI summarily dismisses carriers' long history of law enforcement assistance in cursory fashion.<sup>24</sup> A primary basis for the FBI's proposed requirements is claimed (but undocumented) "instances [in which] a carrier impermissibly refus[es] to provide the requested assistance" and "*anecdotal reports* of instances where carriers have refused to provide assistance to law enforcement even after being presented with a facially valid court order . . . ."<sup>25</sup>

The FBI's "evidence" hardly constitutes a valid basis for imposing onerous recordkeeping and procedural requirements on carriers. In fact, carriers have effective personnel and recordkeeping procedures already in place as well as a 30-year track record of productive cooperation with law enforcement. The Commission should therefore reject the FBI's proposed requirements. For the reasons stated in the comments filed by PrimeCo and other parties, the Commission should also modify its recordkeeping proposals to minimize the burdens imposed on carriers. These minimal requirements fully comport with CALEA and will promote legitimate law enforcement objectives.

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<sup>23</sup> (...continued)

16. PrimeCo also notes that neither the Commission nor the FBI have proposed that information submitted to the Commission for review be afforded confidential treatment pursuant to Section 0.459 of the rules. In light of the highly proprietary — and security-sensitive — nature of such information, carriers must be given assurance that *any* information submitted to the Commission not be made publicly-available.

<sup>24</sup> FBI Comments at 42 ¶¶ 100-101.

<sup>25</sup> *Id.* at 16 ¶ 33, 22 ¶ 46 (emphasis added).



## V. INFORMATION SERVICES PROVIDED BY TELECOMMUNICATIONS CARRIERS ARE NOT SUBJECT TO CALEA REQUIREMENTS

PrimeCo agrees with commenting parties that information services provided by telecommunications carriers are not subject to CALEA's requirements.<sup>26</sup> The FBI, in contrast, seeks to narrow the scope of the information services exemption well beyond Congress' intent. For example, Section 102(8) clearly excludes all information *services* — not “service providers” — from CALEA.<sup>27</sup> The FBI's assertion that only “providers of exclusively information services are excluded from CALEA's requirements” must therefore be rejected.<sup>28</sup>

In addition, the FBI asserts, with no clarification, that “any portion of a telecommunications service provided by a common carrier that is used to provide transport access to information services is subject to CALEA's requirements.”<sup>29</sup> The FBI is unclear as to which telecommunications services it would subject to CALEA under this requirement, making meaningful comment difficult. PrimeCo cautions that the Commission must not unduly narrow the scope of CALEA's information services exemption, and must not apply CALEA's requirements to services other than those Congress intended.<sup>30</sup>

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<sup>26</sup> See, e.g., Ameritech at 2-3; BellSouth at 6; CTIA at 24-25; NTCA at 2; U S WEST at 6-9.

<sup>27</sup> See 47 U.S.C. § 1001(8). As the Commission noted, Congress in CALEA enumerated a wider variety of services than the Communications Act. *CALEA NPRM* ¶ 14; compare 47 U.S.C. § 153(20) with *id.* § 1001. Congress also did not intend “to limit the definition of ‘information services’ to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of ‘information services.’” *CALEA NPRM* ¶ 20 (citing H.R. Rep. No. 103-827, pt. 1, at 23 (1994)).

<sup>28</sup> See FBI Comments at 14-15 ¶ 29.

<sup>29</sup> *Id.*

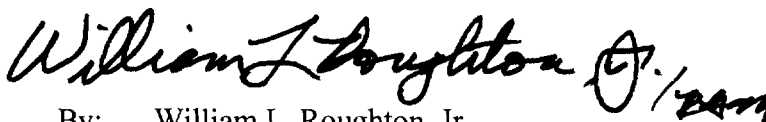
<sup>30</sup> For example, Section 103(b)(2) of CALEA expressly provides that capability assistance  
(continued...)

## CONCLUSION

Congress intended that CALEA accommodate not only the needs of law enforcement, but the legitimate privacy interests of consumers and the technical and financial realities facing telecommunications carriers. Comments in this proceeding demonstrate that the Commission must implement CALEA consistent with those objectives by: (1) facilitating resolution of the standards dispute between law enforcement and industry; (2) extending the October 25, 1998 deadline by two years, as requested by CTIA; (3) rejecting the FBI's misinterpretation of Section 109's "reasonably achievable" standard; (4) rejecting the FBI's intrusive and unnecessary carrier personnel and recordkeeping requirements; and (5) rejecting the FBI's narrow interpretation of CALEA's information services exemption.

Respectfully submitted,

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February 11, 1998